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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 672

IVAN N. FRAVER,

Petitioner,

v.

THE STUDEBAKER CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Ivan N. Fraver, respectfully prays that a Writ of Certiorari issue to review the amended judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on January 11, 1954.

Opinions Below

The opinion of the District Court (W. D. Pa.) (R. 29a-38a*) is reported in 112 F. Supp. 209 and 97 U. S. P. Q. 291.

* References with suffix "a" are to Appellant's Appendix 1 in certified copy of proceedings in Court of Appeals.

The Per Curiam Opinion of the Court of Appeals (R. . . . . is reported in 208 F. (2d) 794 and 100 U. S. P. Q. 259.

Jurisdiction

The original judgment of the Circuit Court of Appeals was entered on December 11, 1953. Petition for rehearing was filed December 30, 1953. It was denied but the judgment was amended as to costs, both on January 11, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. Whether petitioner's constitutional right to trial by jury under the 7th Amendment was not clearly violated by the District Court in setting aside the jury's verdict of validity and infringement, amply supported by evidence, merely because the Court disagreed with certain disputed findings of fact.

2. Whether "invention" and "infringement", in a patent infringement suit tried by a jury, are questions of fact for the jury or matters of law solely for the Court.

3. Whether the District Court violated Rule 50 (b) F. R. C. P. by re-examining the facts tried by the jury, such as the factual determinations of "novelty", "obviousness" of the patented combination to persons having ordinary skill in the art, whether admitted "variations" between the novel patented combination and prior combinations produced "unusual results" and can be considered "a contribution to the art" or merely an "aggregation", whether "anticipated", and whether the accused device had either the "same" or "equivalent" elements as recited in claim 1 therefore constituting "infringement",

although there is substantial evidence clearly supporting the jury's factual findings on all of these matters.

4. Whether the District Court, merely by hindsight, may hold a new combination of elements, which the Court admits is different from the prior art, as "obvious" to persons having ordinary skill in the art, contrary to the findings of the jury, when there is no supporting testimony whatsoever as to obviousness, but abundant testimony showing non-obviousness, including that of petitioner's three expert witnesses, the Patent Office and respondent's own prior admission that the combination is the "world's most advanced" system. Also whether the Court made a fatal error in determining obviousness as of the date the patent issued instead of at the time the invention "was made," in violation of the Statute (35 U. S. C. 103).

5. Whether the District Court may ignore claims as the measure of the invention and set aside a finding of infringement, even though the accused device falls clearly within the wording of claim 1, by importing unexpressed limitations in the claim and treating "equivalance" as a question of law contrary to this Court's recent decision Graver v. Linde (1950) 339 U. S. 605.

Statutes Involved

This action was based on 35 U. S. C. former 67 (now 35 U. S. C. 281, 284), Appendix A, *infra*, which creates, for the patent owner, an "action on the case" to recover "damages" for patent infringement.

Statement of the Case

Petitioner, Ivan N. Fraver, brought suit on May 6, 1949, against respondent, The Studebaker Corporation, for infringement of his patent No. 1,903,037, issued March 28,

1933, on a car heating, cooling and ventilating means. (Plaintiff's Exhibit 1, R. 41*, Appendix 2.) Petitioner alleged that the Studebaker "Climatizer", Plaintiff's Exhibit 2 (R. 42, 273), a physical exhibit produced by respondent of the accused structure, infringed claims 1, 2 and 3 of his patent. The accused device is also shown in Plaintiff's Exhibits 14 and 15 (R. 258, 259) and photos of Plaintiff's Exhibit 2 in Defendant's Exhibits L to S inclusive. (Partly in Appellant's Appendix 2*.) The case was tried before a jury under the provision of 35 U. S. C. former 67 (Appendix A). The trial lasted almost two weeks and included the testimony of six expert witnesses, three on each side, whose testimony was in sharp conflict on many issues such as that pertaining to the operation of the accused device, equivalance of operation between petitioner's and respondent's devices, definition and application of scientific terms to the accused device, differences between petitioner's structure and prior patents, whether the patented combination would have been "obvious" to persons having ordinary skill in the art, whether the patented combination produced "unusual results" and could be considered as a "contribution to the art" etc., which factual issues were decisive on the questions of "validity" and "infringement." The trial involved also tests in open court and demonstrations of working models, Plaintiff's Exhibits 2 and 13. (R. 42, 273, 242.)

After almost two weeks of trial and after being charged by the court concerning validity and infringement (R. 496-520), the jury, in answer to interrogatories prepared by the court, found that claims 1, 2 and 3 were valid and that claim 1 (R. 31a*) was infringed and returned a general verdict in the sum of $79,250, with costs, in favor of

* References R are to record in District Court; Appendix 2 is Petitioner's (Appellant's) Appendix in Court of Appeals.

petitioner, and judgment was entered on this verdict on October 30, 1952.

A motion by respondent, at the close of the trial, for a directed verdict was refused (R. 487-488) and the Court, as stated above, referred the questions of "validity" and "infringement" to the jury for determination. Respondent, subsequent to the verdict, filed a motion to set aside the verdict and to enter judgment *n. o. v.* in its favor. The District Court, months after the verdict and judgment, granted this motion and, by its Order and Opinion of May 1, 1953, (R. 29a-38a) set aside the judgment in favor of petitioner and directed entry, instead of a judgment in favor of respondent. Petitioner appealed from this action of the District Court. The Court of Appeals for the Third Circuit, by a short *Per Curiam* opinion of December 16, 1953, merely affirmed the District Court without further opinion. Petitioner filed a timely petition for rehearing on December 30, 1953, which was denied on January 11, 1954.

Petitioner asks this Court to grant certiorari to review the propriety of the District Court in setting aside the jury's verdict and granting judgment notwithstanding the verdict.

It is clear from the Opinion of the District Court, that it set aside the jury's verdict merely because it reweighed the evidence and drew different inferences and conclusions of fact.

Reasons Relied on for Allowance of the Writ

Summary of Argument

1. The decision of the lower Court is directly in conflict with the decisions of this Court. The District Court re-examined the facts tried by the jury, ignored the evidence strongly supporting the jury's verdict of validity and infringement, drew contrary inferences and conclusions than the jury on disputed *factual* issues pertaining to validity and infringement, thereupon set aside the verdict and granted judgment *n. o. v.* Such usurpation of the jury's function as the finder of facts is in direct conflict with the consistent decisions of this Court for more than the past 150 years.

Furthermore, the Court's usurpation of the jury's function of finding facts clearly deprives petitioner of his right to trial by jury under the 7th Amendment of the Constitution.

Moreover, the granting of judgment *n. o. v.* by the Court was improper and a clear violation of Rule 50 (b) FRCP since, as stated by the rule, a motion for judgment *n. o. v.* raises only "*legal* questions", whereas the judge granted this motion to re-examine questions of *fact*.

2. This Court has consistently held, for more than 150 years, that disputed facts concerning "validity" and "infringement", in actions at law, are questions of fact for determination by the jury, and not questions of law for determination solely by the Court. But in spite of this long line of decisions by this Court, the Court below treated these questions as questions of law solely for the Court.

But the crucial point in this case is that regardless whether validity and infringement are questions of law or

fact, it is nevertheless very clear from the Opinion of the District Court (R. 29a-38a) that it set aside the jury's verdict of validity and infringement merely because it came to different conclusions on *factual* issues, such as the issue of "obviousness" of the patented combination to persons having ordinary skill in the art, whether admitted "variations" between the novel patented combination and prior combinations produced "unusual results" and can be considered "a contribution to the art" or merely an "aggregation", whether "anticipated", and whether the accused device had either the "same" or "equivalent" elements as recited in claim 1 therefore constituting "infringement". This Court has consistently held each and every one of these issues to be a question of *fact* but the lower Court completely disregarded this Court's decisions and acted directly contrary thereto.

Another fatal error of the Court is that it considered the question of obviousness of the invention as of "1933", the date of issuance of the patent, whereas it is fundamental in patent law, and even provided by Statute (35 U. S. C. 103) (Appendix A), that obviousness should be determined "at the time the invention was made," namely in 1931. And to make matters even worse there is no testimony in support of the Court's finding of obviousness at either date.

3. A sharp conflict exists among the various Circuit Courts of Appeal also between certain of them and this Court, concerning the respective functions of Court and jury on questions of validity and infringement. While most circuits have followed the consistent holdings of this Court to the effect that validity and infringement are questions of "fact" for determination by the jury, the Third Circuit recently, step-by-step, has been giving less and less attention to jury verdicts in patent cases. Finally, in the

instant case, it has gone *all the way* and completely disregarded altogether the jury's findings of fact and verdict and treated validity and infringement as questions of "law" solely for the Court.

Therefore, unless corrective action is taken by this Court, the Constitutional right to trial by jury will become a mockery rather than a fundamental guaranteed right. Presently an utter state of confusion exists among the various circuits, who are torn between the long line of decisions of this Court holding validity and infringement as questions of fact for the jury, and recent cases ignoring this precedent and treating them as questions of law. Much confusion in the law started with the recent A & P case (34 O. U. S. 147) wherein, while the majority opinion held invention to be a question of fact, the concurring opinion of Mr. Justices Douglas and Black held that "the question of validity of a patent is a question of law." Below are cited hopelessly conflicting decisions among the various circuits on this question. This Court, in face of the utter confusion that exists should resolve doubts and conflicts and take a clear stand on this vital question so as to guide lower Courts as to the respective functions of Court and jury on questions of validity and infringement, and thus enable justice to be properly and uniformly administered in the many existing and future patent jury cases that surely will be plagued by this same question.

And equally, if not more important than a ruling on the above is a ruling to the effect that regardless of whether these questions are of law or fact, the District Court should not have vacated the Jury's verdict merely because the Court drew different inferences and conclusions from conflicting evidence on purely *factual* issues, such as whether the patented combination would have been "obvious" to

persons having ordinary skill in the art, whether it produced "unusual results", whether it constituted a "contribution to the art" etc.

4. The evidence, including testimony of three outstanding expert witnesses of petitioner and ruling of the Patent Office on exactly the same issue, strongly supports the jury's verdict of validity and infringement since it shows that petitioner invented a novel combination and arrangement of elements mutually cooperating to provide new and unusual results as a consequence of the unification or combination, constituting a distinct and very outstanding contribution to the art of ventilating a motor vehicle, and which completely replaced all existing prior ventilating devices used by respondent in automobiles and made obsolete all existing devices. Evidence of Petitioner's significant contribution to the art includes respondent's own prior admission in its advertising literature (Pl. Ex. 15, Petitioner's Appendix 2) that the infringing combination constitutes "the world's most advanced fresh air" ventilating system. Of course, after respondent was charged with infringement it made an about face and argued that the combination produced no unusual results. The Court accepted this and held that Fraver's patent disclosed "unimportant changes" (R. 35a). How much can respondent get away with? Petitioner's novel combination and arrangement of elements not only met but *exceeded* the present requirements, or so called standards, of invention set forth in the Constitution, Statutes and decisions of this Court. Certainly the Constitutional intent of "encouraging" invention was not carried out in this case wherein the Court usurped the jury's function and made its own findings of fact, resolving every doubt against, instead of for, petitioner. The District Court's hostile attitude towards trial by jury was

best expressed by its statement in open Court that it was "against" trying this case before a jury. (R. 264-27a.)

ARGUMENT

1. The Court Improperly Set Aside the Jury's Verdict Only on Questions of Fact Rather than on Questions of Law thus Violating Rule 50(b) F. R. C. P. and Depriving Petitioner of His Constitutional Right to Trial by Jury.

The District Court re-examined the facts tried by the jury, ignored the evidence strongly supporting the jury's verdict of validity and infringement, and because it drew contrary inferences and conclusions than the jury on factual issues pertaining to validity and infringement, set aside the verdict and granted judgment *n. o. v.*

Thus, the Court violated Rule 50 (b) F. R. C. P. under which respondent's motion for judgment *n. o. v.* was brought, since it raises only questions of *law*. Rule 50(b) is quoted in part as follows:

> "Whenever a motion for a directed verdict is made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion."

Moore's Federal Practice (2nd Ed.), page 2342 approvingly quotes Marsh v. Illinois Central (C. A. 5—1949) 175 F. (2) 498 in which the Court of Appeals stated:

> "A motion for a directed verdict, or for a judgment notwithstanding the verdict under Rule of Civil Procedure 50, raises a question of law only. Whether there is any evidence which, if believed, would authorize a verdict against movant."

However, the Court's grounds for granting this motion are all directed to questions of fact, and not of law.

The decision of the District Court also violates the 7th Amendment to the Constitution, which provides:

> "In Suits at common law * * * the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

This provision of the Constitution positively precludes re-examination of facts tried by the jury as done by the Court.

U. S. Code, Title 28, Section 2072, which grants this Court the lower to prescribe rules of civil procedure for District Courts, specifically provides:

> "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

This Court preserved "inviolate" this right to a jury trial under the Constitution or statute of the United States in Rule 38 F. R. C. P.

As evidence of the District Court's disregard of petitioner's constitutional rights and prejudicial attitude merely because petitioner sought a jury trial, is its declaration in open Court that it is "against" trying the instant case by a jury (R. 264—R. 27a). But Congress, on the contrary, saw fit, in the New Patent Act of 1952, to emphatically reaffirm a patentees' Statutory and Constitutional right to trial by jury on questions of validity and infringement (former 35 U. S. C. 67 restated as 35 U. S. C. 281, 284—see Appendix A hereto).

In the apt words of Mr. Justice Douglas (Cardozo lecture: in 49 Col. Law Rev. 735, 752) the Court adopted "a philosophy hostile to that reflected in the legislation" (also to the decisions of this Court).

This Court has always jealously protected a litigant's right to a jury trial in applicable cases and has consistently given the party who prevailed before a jury the benefit of every doubt in all cases of review.

In Parsons v. Bedford *et al.* (1830) 3 Pet. (28 U. S.) 433, Justice Story stated:

> "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. * * *"

In Root v. Lake Shore and Michigan Southern Railway Company (1882) 15 Otto (105 U. S.) 189, 206 this Court said:

> "* * * the 7th Amendment forbids any infringement of the right of trial by jury, as fixed by the common law. And the doctrine applies in patent cases as well as others."

Later, in Jacob v. City of New York (1942) 315 U. S. 752, this Court said:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

2. The District Court's Action is Directly Contrary to the Decisions of this Court.

This Court has consistently held that lower courts are not permitted to ignore evidence supporting a jury's verdict, reweigh the evidence and set aside a jury's verdict merely because the jury could have drawn different inferences or conclusions, or even because judges feel that other results are more reasonable. In Bailey v. Central Vermont Railway, Inc. (1943) 319 U. S. 350, 353 this Court held:

> "* * * The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasizes the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue. (Citations omitted). To withdraw such a question from the jury is to usurp its functions."

And in Tennant v. Peoria & Pekin Union Railway Company (1944) 321 U. S. 29, 35 this Court said:

> "* * * Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

And in Lavender v. Kurn (1946) 327 U. S. 645, 653 this Court stated:

> "* * * But where, is here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

2(a). This Court has Consistently Held that Validity and Infringement are Questions of Fact for Determination by the Jury.

This Court has consistently held, for more than 150 years, that in an action at law for patent infringement the questions of "invention" and "infringement" are questions of *fact* for determination by the jury, rather than questions of law for determination by the Court.

In Hotchkiss v. Greenwood, 11 How. 248 (U. S. 1850) this Court decided that whether an improvement is merely the work of a skilled mechanic or required invention, was a question of fact which was properly submitted to the jury.

Other earlier decisions holding "novelty," "validity" and "infringement" as questions of fact and not of law are Battin v. Taggert, 17 How. 74; 84 (U. S. 1855); Bischoff v. Wethered, 9 Wall. 812, 815-6 (U. S. 1870); Turril *et al.* v. Railroad Co. (1863) 1 Wall. (68 U. S.) 491; Keyes v. Grant, 118 U. S. 25 (1886); and

In Thomson Co. v. Ford Motor Co., 265 U. S. 445 (1924) at page 446 this Court stated:

> "The question whether an improvement requires mere mechanical skill or the exercise of the faculty of invention, is one of fact; and in an action at law for infringement is to be left to the determination of the jury." Keyes v. Grant, 118 U. S. 25, 36, 37.

In Stilz v. United States, 269 U. S. 144, 147 this Court said

> "Infringement is a question of fact."

This Court, in United States v. Esnault-Pelterie, 299 U. S. 201 (1936) at 295 held:

> "Validity and infringement are ultimate facts on which depends the question of liability. In actions of

law they are to be decided by the jury." (Citing many Supreme Court cases.)

This Court recently, in 1948, affirmed in 338 U. S. 267 the decision of the 9th Circuit Court of Appeals of Faulkner v. Gibbs, 170 F. 2d 34 where the Court of Appeals held at 37:

"Questions of invention and patent validity are questions of fact * * *"

"The issue of infringement presents a question of fact."

This Court in the recent A & P v. Supermarket case, 340 U. S. 147 (1950); 87 U. S. P. Q., at 306, held "invention" as a finding of fact, saying in the *majority* opinion:

"We set aside no finding of fact as to invention for none has been made * * *"

Walker on Patents (Dellers Ed.) page 115 states:

"The question of invention is a question of fact and not of law." (Citing many cases.)

And on page 1210 Walker states:

"The question of infringement is one of fact for the jury. (Winans v. Denmead, 15 How. (56 U. S.) 330, 344; Coupe v. Royer, 155 U. S. 565, 575.)"

That infringement is a question of fact and not of law was recently reiterated in Graver Tank Mfg. v. Linde Air Products Co., 339 U. S. 605, 609 (1950).

Thus, in decision after decision this Court has consistently held that "invention" and "infringement" are questions of fact for the jury and not questions of law for the court. No authoritative judicial holding of this Court can be found holding conflicting evidence as to either invention or infringement as being questions of law for the Court rather than questions of fact for the jury. Nevertheless

the lower Court ignored the decisions of this Court and treated "validity" and infringement as questions of law.

The present case is distinguishable from such cases as Herald v. Rice, 104 U. S. 773, 749 (also Singer v. Cramer, 192 U. S. 265) wherein there was no conflicting evidence or testimony presented. The only question in the Herald case was for the Court to compare the contents of an original and a reissue patent to see whether or not they were identical,—a matter obvious from the face of the patents. This was considered a matter of law since no extrinsic evidence whatsoever was presented, or needed, such as evidence to explain terms of art, or to apply terms to subject matter as in the present case.

There was considerable dispute of fact in the instant case concerning the operation of the Climatizer, such as the direction of flow of air when discharged into the chamber (R. 16a, R. 376-377), whether such air in the chamber was stagnant (R. 378) or swirled (R. 130), the air confining effect of the seat support and panels (R. 27a), the heating or cooling effect of the air in the chamber (R. 16a), and other matters pertaining to identity or equivalency of the Climatizer and Fraver chambers, which involved the credibility of various witnesses, and were resolved by the jury in favor of petitioner. The evidence clearly shows that the Climatizer has a "chamber" as in claim 1. (R. 7a, 11a, 16a, R. 331-336.)

2(b). Regardless Whether Validity and Infringement are Questions of Fact or Law, the Particular Findings of the Jury Pertaining to These Issues and which were Set Aside by the Court have been Consistently held by this Court to be Questions of Fact.

But, regardless whether validity and infringement are questions of fact or of law, the more important and crucial

point in this case is that the specific reasons given by the Court for setting aside the verdict, as clearly apparent from the District Court's Opinion (R. 29a-38a), are that it arrived at different conclusions and obtained different inferences than the jury from the conflicting testimony given on *factual* issues.

More specifically, the District Court arrived at different factual inferences and conclusions than the jury as to whether the invention, in the words of the Court, was "obvious" to those skilled in the art" (R. 33a); whether the patent claimed a novel combination or an "aggregation" of elements (R. 31a, 35a) involving the consideration of whether the admitted "variation" (R. 32a) between the novel patented combination and the prior art provided "unusual results" and constituted a distinct "contribution to the art" (R. 35a); and whether the accused device had either the same or "equivalent" elements (R. 37a) as the claimed combination so as to constitute an "infringement." This Court has consistently held that each and every one of these issues to be a question of fact for the jury and not of law for the Court.

The Court, after frankly admitting "variations" between petitioner's patented combination and the prior art, stated (R. 32a, 33a) that the invention "in 1933, was obvious to those skilled in the art". However, the question of whether or not an improvement is "obvious to those skilled in the art" has been consistently held by this Court to be a question of *fact* for the jury since it involves many factual circumstances surrounding each particular case.

In Thomson Co. v. Ford Motor Co., *supra*, at p. 446 this Court held:

> "The question whether an improvement requires mere mechanical skill or the exercise of the faculty

> of invention is one of fact; and, in an action at law for infringement is to be left to the determination of the jury." (Citing many cases.)

In Faulkner v. Gibbs, *supra,* recently affirmed by this Court (338 U. S. 267), the Court of Appeals held (p. 137):

> "The question of whether or not a new and useful combination is the result of mere mechanical skill, or of inventive faculty, is one of fact."

The District Court, *in vacuo* and only with the benefit of hindsight, incorrectly made its own appraisal as to what would have been obvious to persons having ordinary skill in the art in 1933.

The Court admitted there are differences or "variations" (R. 32a, 33a) between the patented combination and the most pertinent prior art, but made its own factual appraisals that they did not constitute a "contribution to the art" (32a) or produce "new or unusual results." (R. 35a.) This is directly contrary to the evidence including the position of the Patent Office on the same issue, and even to respondent's own admissions, as will be specifically set forth under title 4, *infra.* These issues are clearly factual issues for the jury.

Not only did the Court err by usurping the jury's function of determining the factual question of "obviousness," but made the further fatal error of making this determination at the wrong time, namely "in 1933" (R. 32a, 33a), the issue date of the patent, instead of 1931, the date the invention "was made" as provided by statute 35 U. S. C. 103, which summarizes existing patent law on the subject of what constitutes invention. (Appendix A.) It will also be seen from this provision of the statute that the question of invention turns largely on whether or not "the subject

matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains." Therefore the Court's determination of obviousness "in 1933" is directly contrary to the statute.

The District Court stated that another issue was "to determine whether it (the patented invention) is a combination which produces a new and unusual result or is simply an 'aggregation.'" (R. 31a.)

But this Court has consistently held that the question of invention as distinguished from mere aggregation and the question of whether prior patents or publications anticipate a patent as being questions of fact. More specifically, this Court affirmed Faulkner v. Gibbs, C. A. 9, 1948, *supra*, wherein the Court of Appeals stated at 37:

> "What constitutes invention as distinguished from mere aggregation, is a question of fact • • •.
>
> "Whether prior art patents or publications disclose or anticipate the subject matter of a patent in issue is deemed as a question of fact."

This Court in affirming (338 U. S. 267) said:

> "the patent was sustained because of the fact of combination rather than the novelty of any particular element."

That "anticipation" is a question of fact was also held in Haines v. McLaughlin, 135 U. S. 584; Battin v. Taggert and Bischoff v. Wethered, and Turril v. Railroad, of this Court, *supra*. And in Tucker v. Spalding, 13 Wall (80 U. S.) 453 this Court, reversing the lower Court for making its own comparison of the patent and prior art said, in reversing (p. 456):

> "This court has no more right than the court below to decide that the one patent covered the invention of

> the other, or that it did not; and it is obvious that extended argument here, to prove such general resemblance as would require the submission of both patents to the jury, might prejudice the plaintiff's case on the new trial which must be granted."

The Court usurped the jury's function in determining "infringement" which, as shown by the above quoted decisions, under title 2(a), has been consistently held by this Court to be a question of *fact* for determination by the jury. The Court made the further error of incorrectly determining infringement by disregarding the claims as the measure of the invention and by artificially importing unexpressed limitations in the claims, such as the limitation that the chamber is "relatively air tight". (R. 34a.) This language does not even appear in the specification. Actually claim 1 is clearly readable on the accused device therefore infringed since each element therein finds its exact counter-part in the Climatizer as testified by three expert witnesses of petitioner. The proper test of infringement was recently stated by this Court in Graver v. Linde, 339 U. S. 605 (1950) on page 607:

> "In determining whether an accused device or composition infringes a valid patent, resort must be had in the first instance to the words of the claim. If the accused matter falls clearly within the claim, infringement is made out and that is the end of it."

By this test the Climatizer clearly infringes,—but the District Court ignored this Court's decision.

The Court then went on to say "since no substantially airtight chamber or its equivalent is embodied in the accused structure, there is no infringement." (R. 37a). Thus the Court not only rewrote the claim by importing unexpressed limitation "substantially airtight" but made its

own decision as to the factual determination of equivalency. But "equivalence" is clearly a question of *fact* for determination by the jury as this Court very recently reiterated in Graver v. Linde, *supra,* by stating:

> "A finding of equivalence is a determination of fact. Proof can be made in any form: through testimony of experts or others versed in the technology: by documents including texts and treatises; and, of course by the disclosures of the prior art. Like any other issue of fact, final determination requires a balancing of credibility, persuasiveness and weight of evidence."

And on page 608 this Court continued:

> "The doctrine (of equivalents) operates not only in favor of the patentee in a pioneer or primary invention, but also for the patentee of a secondary invention."

And on page 609:

> "* * * Equivalency, in the patent law, is not the prisoner of a formula and is not an absolute to be considered in a vacuum. It does not require complete identity for every purpose and in every respect. In determining equivalents, things equal to the same thing may not be equal to each other and, by the same token, things for the most purposes different may sometimes be equivalents * * *."

The District Court ignored the above decision of this Court and made its own finding of equivalents as a determination of law instead of fact and in denying petitioner any right to equivalents.

3. The Courts of Appeals Are Hopelessly in Conflict on the Effect of a Jury Verdict and the Conflict Should be Resolved by this Court.

There is a hopeless conflict among the several Courts of Appeals as to the effect of a jury verdict upon the factual questions of invention and infringement in a patent infringement action. For many years, the Courts of Appeals gave jury verdicts the respect accorded to jury verdicts by the Constitution and by this Court. However, particularly of late, there is a growing tendency to disregard the jury verdict almost completely in patent infringement cases. There is no sound reason for this apparent trend because this Court's decisions, the statutes, and the Seventh Amendment to the Constitution remain unchanged. This Court should, in the exercise of its discretion, put an end to this unauthorized drift towards judicial abolition of the jury system in patent infringement actions.

Examples of cases supporting the sanctity of the jury verdict on questions of invention and infringement, treating them as questions of fact, include the following:

Singer Mfg. Co. v. Brill (C. C. A. 9, 1892) 54 Fed. 380, cert. den. (1893) 154 U. S. 517;

Harper & Reynolds v. Wilgus (C. C. A. 9, 1893) 56 Fed. 587;

Holmes v. Truman (C. C. A. 9, 1895) 67 Fed. 542, approved on this point in Thomson Spot Welder Co. v. Ford Motor Co. (1924) 265 U. S. 445, 446;

San Francisco Bridge Co. v. Keating (C. C. A. 9, 1895) 68 Fed. 351;

Willis v. Miller *et al.* (C. C. A. 2, 1903) 121 Fed. 985;

Heide v. Panoulias (C. C. A. 2, 1911) 188 Fed. 914, cert. den. (1911) 223 U. S. 722;

Transit Development Co. v. Cheatham Electric Switching Device Co. (C. C. A. 2, 1912) 194 Fed. 963;

Trustees of Masonic Hall etc. v. Electrical Floor Box Corp. (C. C. A. 2, 1914) 218 Fed. 642;

Cutter Laboratories Inc. v. Lyophile-Cryochem Corp. *et al.* (C. A. 9, 1949) 179 F. (2d) 80; and

Oxnard Canners Inc. *et al.* v. Bradley (C. A. 9, 1952) 194 F. (2d) 655, cert. den. (1952) 343 U. S. 978 wherein the Court of Appeals stated (p. 656):

"Appellants' first specification of error lies in the contention that there was no evidence to support the verdict of the jury on the issues of validity and infringement. In testing the sufficiency of evidence to sustain a verdict in favor of plaintiff, the evidence and all reasonable inferences deductible therefrom must be considered in the light most favorable to plaintiff and any conflict in the evidence must be resolved in favor of the jury's findings. Where a jury under instructions against which no complaint is made, finds for the plaintiff, plaintiff is entitled on appeal to have considered as true all evidence which was offered upon controlling issues and were entitled to all inferences reasonably to be drawn therefrom."

The Court of Appeals, in the Oxnard case, then proceeded to review the evidence and found evidence in the record upon which the finding of the jury verdict could be sustained. Thus the Court followed the rule it had laid down in Cutter Laboratories v. Lyophile-Cryochem Corp., 179 F. 2d 80, 84 (9 Cir. 1949) that the rules governing the review of jury verdicts are the same in patent cases as those applicable to other tort verdicts and that the jury's

verdict must stand where credibility of witnesses is to be weighed.

The decision in the instant case is also in conflict with Watson v. Heil, 192 F. 2d 982 (C. A. 4, 1951) in which the District Court, as in the instant case, made its own decision that the patent to a combination of elements was invalid in view of the A & P case, and excluded evidence to prove "invention" since it was impressed, in vacuo,—that the patent did not involve invention. The Appellate Court reversed stating (p. 984):

> "Without attempting to assess the value of the proffered evidence, indeed we are in no position to do so since the defendant was not called upon to controvert or explain it, we think that it is at least entitled to consideration; for it bears on the question whether in fact the disclosures of the patent involved invention. When it is shown that a mechanical problem has persisted for some time, and men of ordinary skill in the art have failed to meet it when it is to their interest to do so, there is at least some ground for the conclusion that it was beyond their capacity. Such a circumstance has not infrequently been held sufficient to carry a discovery across the inventive line."
>
> "We think that the validity of the patent must be considered anew in the light of any competent evidence that may be offered along the lines above described, and that the judgment should therefore be reversed and the case remanded for a new trial, * * *".

The Court of Appeals thus recognized that evidence bearing on the issue of "invention" should be weighed as questions of fact decisive of this issue instead of treating "invention" as a question of law solely for the Court.

Other recent decisions holding invention as a question of fact are: B. F. Sturtevant Co. v. Mass Hair & Felt Co., 122 F. 2d 900 (C. A. 1, 1941); McElrath v. Industrial Rayon, 123 F. 2d 627 (C. A. 4, 1941); Stubnitz-Greene v. Fort Pitt, 110 F. 2d 192 (C. A. 6, 1940); Pointer v. Six Wheel, 177 F. 2d 153 (C. A. 9, 1949); App. D. C.: Besser v. Ooms, 154 F. 2d 17 (1946).

The action of the lower Courts in the case at bar is clearly in conflict with the above decisions.

Examples of recent cases, on the other hand, which have ignored jury verdicts and treated the issues of validity and infringement as questions of law solely for the Court are:

Refrigeration Patents Corp. v. Stewart-Warner Corp., (C. C. A. 7, 1947) 159 F. (2d) 972, cert. den. (1947) 331 U. S. 834, 91 L. Ed. 1847, rehearing den. (1947) 332 U. S. 803,

Packwood v. Briggs & Stratton Corp. *et al.*, (C. A. 3, 1952) 195 F. (2d) 971, cert. den. (1952) 344 U. S. 844 97 L. Ed. *44, rehearing den. (1952) 344 U. S. 882, 97 L. Ed. *62, and

McIlvaine Patent Corp. v. Walgreen Co. (C. C. A. 7, 1943) 138 F. (2d) 177.

As pointed out under title 2 above this Court has consistently, for over 150 years, held that validity and infringement are questions of fact for the jury. However, much confusion in the law exists, particularly since the recent A & P case (34 O. U. S. 147) wherein, while the majority opinion held invention to be a question of fact, the concurring opinion of Mr. Justices Douglas and Black held that "the question of validity of a patent is a question of law."

An indication of the state of confusion that exists is found in the following quotations:

Falkenberg v. Bernard Edward Co., 175 F. (2) 427 (C. A. 7, 1949) at 430:

> "A long line of cases could be cited holding that the determination of patentable invention is a question of fact; however, other courts have dealt with the issue as though it were a question of law. A citation of such authorities would not be helpful in view of the recent decision of the United States Supreme Court in Graver Tank Mfg. Co. Inc. *et al.* v. Linde Air Products Co., 336 U. S. 271, 69 S. Ct. 535. In that case Justices Black and Douglas, in a concurring opinion, stated that it is their view that the ultimate question of patentability is a question of law. However the majority opinion specifically applies Rule 52 (a) Federal Rules of Civil Procedure, 28 U. S. C. A.

Hanovia Chemical & Mfg. Co. v. David Butterick Co., 127 Fed. 2d 888 (C. A. 1, 1942) at p. 889 the Court referred to:

> "* * * the conflict between the frequently reiterated categorical statement that the question of invention is one of fact and the almost innumerable instances in which the courts have dealt with it as though it were one of law * * *."

National Slug Rejectors Inc. v. A. B. T. Mfg. Corp., 164 F. (2) 333 (C. A. 7, 1947) at 336:

> "This century-old question is always perplexing. We cannot avoid or evade it. We must meet it. Patentable invention is a question of law."

Recently a number of patent litigants have asked this Court to grant certiorari to define the rights of a Circuit Court of Appeals with respect to the issues here presented. Compared to the number of jury cases, the petitions are numerous. They demonstrate that the question is one of

real public interest and the time is "over-ripe" for its consideration. This Court has not yet spoken on the subject but should do so in view of the large number of patent jury cases pending and which are being filed.

Petitioner submits that the hopeless conflict can be clarified only by the grant of certiorari. Justice may be best served by the grant in this case since the Court has gone farther towards ignoring the jury's verdict supported by evidence than any other court before in any other case, therefore would serve as a bad precedent for future cases if certiorari were denied.

4. Evidence Strongly Supports Jury's Verdict of Validity and Infringement.

As stated by this Court in Gunning v. Cooley, 281 U. S. 90 (1930) at 94:

> "Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury, and in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them * * *."

Applying the above as the proper test in deciding respondent's motion for judgment *n. o. v.*, the evidence clearly and strongly supports the jury's verdict of validity and infringement of claim 1.

After petitioner, Fraver received his patent in 1933 when in poor financial circumstance (R. 27a) he disclosed it to respondent and respondent wrote him (Pl. Ex. 4) (App. 2)

saying that their engineers "reviewed the merits" of his invention. Petitioner in 1933 demonstrated a car embodying certain features of his invention to respondent at the latter's factory. (R. 173-174, 181.) Respondent wrote in 1934 and acknowledged petitioner's visit to its factory (R. 226-227) (Pl. Ex. 3) (App. 2), but stated:

> "After your visit to our plant sometime ago this matter was discussed with our engineers and it was decided not to take any definite action at the present time."

During this time and for many years later, respondent as well as other auto manufacturers and dealers continued to sell only the old-fashioned type of heaters mounted under the dashboard, both hot air and hot water types. In 1939, six years after Fraver disclosed his patent to respondent, respondent admits was the earliest it "conceived" or started development of a ventilating system introducing fresh outside air through vanes by momentum of the car (R. 259-260) (Pl. Ex. 16) (R. 282, 284). Therefore, by respondent's own admission, their development of the Climatizer was not an independent one but one appropriated from Fraver. Respondent in 1940 admittedly was the first in the field to use such air conditioning system in automobiles (R. 154-155) while others continued to use dashboard heaters.

Respondent's own advertising, in announcing the Climatizer (Pl. Ex. 15) (Appendix 2), acclaimed it as the "world's most advanced fresh air heating, ventilating and defrosting system" and correctly listed many outstanding and novel and unusual features of Fraver's system. Of course, now that respondent is accused of infringement it makes an "about face" and says there was nothing to Fraver's new combination and it was a matter obvious

to anyone skilled in the art, though no one thought of it for more than 40 years during which a crying need existed.

Respondent's expert witness D. L. Davis admits that the Climatizer "was generally accepted by the motoring public with enthusiasm, and encouraged us to further improve it." (R. 285). Respondent's sales were substantial, admittedly running over $8,300,000 in a period of three years. (R. 40-41.) The Climatizer, admittedly, completely replaced dashboard heaters in respondent's automobiles (R. 284-285) which are practically no longer in use in automobiles of any kind. This public acceptance, and displacement of prior devices, has been held by this Court to clearly indicate invention rather than mechanical skill.

The prior art urged by respondent shows that attempts have been made to improve ventilating systems for railway cars and the like since 1888. (Lyon patent 387, 173). But in spite of the many types of systems patented, over 30 of which were urged by respondent, extending over a period of 43 years before Fraver filed, *none* were found sufficiently practical for adoption in automobiles. (R. 155.) (R. 26a, 27a). The automobile industry is one of the most competitive industries and their engineers have been constantly striving for improvements in ventilating systems over many years prior to the Fraver patent. These facts clearly refute the conclusion that respondent's invention was "obvious" to those skilled in the art. If it was obvious why wasn't it adopted sooner, particularly in view of the urgent demand and the substantial success it immediately enjoyed?

This Court said in Expanded Metal Co. v. Bradford, 214 U. S. 366, at 381:

> "It may be safely said that if those skilled in the mechanical arts are working in a given field, and have

failed after repeated efforts, to discover a certain new and useful improvement, that he who first makes the discovery has done more than make the obvious improvement which would suggest itself to a mechanic skilled in the art, and is entitled to protection as an inventor."

This "viewing after the event" was condemned by this Court in Goodyear Tire and Rubber Inc., *et al.* v. Ray O Vac Co., 321 U. S. 275, 60 U. S. P. Q. 386.

The only element of invention was the addition, to the conventional dry cell, of an outer metallic casing to make it leakproof. This idea seemed so simple that Justice Black in his dissenting opinion stated:

"Antiquarians tell us that the use of solid containers to hold liquids predate the dawn of written history."

But this Court realizing that even a short step from the impractical to the practical is invention, held otherwise in its majority opinion.

Justice Roberts speaking for the Court said p. 388:

"Viewed after the event the means • • • seem simple and such as should have been obvious to those who worked in the field, but this is not enough to negative invention • • •. Accepting as we do the findings below we hold the patent valid and infringed."

The holding in the Ray O Vac case that apparent simplicity, in retrospect, does not negative invention was affirmed in the recent A. & P. vs. Supermarket Equipment case, 340 U. S. 147 wherein this Court in commenting on alleged invention in making a merchant's counter long, carefully cautioned (p. 305):

> "We need not go so far as to say that invention never can reside in mere change of dimensions of an old device."

In the A & P case it was attempted to repatent the familiar or old combination of a pool ball type rack slidable on a table merely on the basis of new use, (sliding groceries instead of pool balls) but the results of the old combination were exactly the same as before, without improvement.

Therefore, Fraver's invention greatly exceeds the standard of invention set forth by this Court in the above cases.

That Fraver's claimed novel combination and arrangement of elements is not old and is not shown in the prior art is admitted by the Court (R. 32a, 33a) and by respondent's patent expert McNulty (R. 443). The Court cited, as the most pertinent prior art, the obviously far fetched patents to Cook, Cooke and Crowther (showing streetcar systems) and the Pickwick Bus publication (R. 32a) (Appendix 2), all of which fail to show Fraver's combination, and illustrate combinations never found practical for automobiles. The Court acknowledged that none of these showed petitioner's specific combination since, in the words of the Court, they discharged air "into an unenclosed space underneath the seats" and admitted that there was a "noticeable variation" between the patented combination and those in the above prior art in that "the space under Fraver's seats is enclosed by the floor, seat cushion and seat supporting means etc." (R. 32a.) The Court then made its own factual appraisal that "this variation in the underseat construction could scarcely be considered as a contribution to the art", (R. 32a) and then concluded that "in the light of the prior disclosures, that the standards of invention were not met and that his (Fraver's) patent was anticipated, lacks novelty, and in 1933, was obvious to

those skilled in the art." (R. 33a.) The Court stated that the patent disclosed "unimportant changes" (R. 35a). This conclusion was directly contrary to that of the Patent Office which had cited this same Cooke patent (typical of the remaining three references in presenting the same issue of discharging air into the car instead of a chamber) and discarded it as a reference in favor of patentability. The Examiner of the Patent Office, who is an expert on this matter, concluded that the above mentioned "variation" over the prior art was indeed a patentable contribution to the art. There were other "variations" over Cooke, such as the lack of a "cowl" or conducting pipe leading "under" the floor of the car as recited in claim 1. All three of petitioner's witnesses also testified that Fraver's novel combination was a significant contribution to the art. Certainly the jury was entitled to believe the Patent Office and these three eminently qualified witnesses on the factual issues of whether "unusual results" were produced and whether the invention was a "distinct contribution to the art" (R. 35a). These are clearly factual issues.

That Fraver's novel combination produced new, improved and unusual results is admitted even by respondent in its own advertising (Pl. Ex. 15) (Appendix 2) wherein respondent claimed the Climatizer combination as "the world's most advanced fresh air" heating and ventilation system and correctly summarized many new and ususual results (attributable to Fraver's infringed novel combination). Respondent's advertising, above, states:

> "The Climatizer, when installed, becomes a built-in integrated part of the car—there are no unsightly protuberances, parts or gadgets to bark shins, skuff knees or detract from the luxurious interior appointments of your new Studebaker."

These novel and unusual features come from using petitioner's novel combination including the cowl ventilator for admitting outside air coupled with the use of the front seat and seat supporting means for enclosing, concealing and protecting the outlet of the ventilating unit and avoid unsightly protuberances which detract from appearance, as did the old dashboard mounted ventilating units, as well as to protect the passengers against possible injury. Respondent, as did petitioner, avoided the use of known projecting vanes on the sides of the car behind the door which comprise dangerous obstructions, and avoided the necessity of making slots or holes in the sides of the seats, or otherwise altering "conventional" seats and supporting means. As in petitioner's combination, only standard auto parts are employed and no changes in body design are required for installing the Climatizer.

Respondent continues in its advertising (Pl. Ex. 15) (Appellant's Appendix 2):

> "A Climatizer-equipped car has no cold spots and is free from hot blasts and drafts. Heat is distributed evenly throughout the car. Comfortable, healthful living room temperature is maintained even in subzero weather."

These novel and unusual features are clearly obtained from respondent's complete appropriation of petitioner's novel combination, including the definitely novel feature of a seat and seat supporting means for providing an entrance chamber for receiving either hot or cold air and for distributing the air throughout the entire width of the car so that it will emerge through the chamber walls as a plurality of low velocity streams of air, as distinguished from a hot blast or cold draft, and which, for the first time in the art provided the novel result of uniform tem-

perature distribution in a car. (R. 8a, 9a, 13a, 14a-21a.) Because of the diffusion of the air by the seat and seat supporting means, uniform distribution and novel comfort is obtained in spite of the very high volume and velocity of air intake. (R. 20a, 21a.) To show the completeness of respondent's appropriation of the Fraver combination, respondent also uses a baffle or deflecting plate under the front seat (Pl. Ex. 14) to laterally deflect and distribute air underneath the seat as does Fraver's deflecting plate 29.

As stated further in respondent's advertising (Pl. Ex. 15):

> "Only outside air is used for heating and ventilating. Over 250 cubic feet of fresh air per minute is forced into the car—sufficient to replace all air in car interior—every 30 seconds—no stale, used air is recirculated."

Thus by using petitioner's *novel* combination of a cowl ventilating inlet, for insuring maximum velocity and volume of inflow of fresh outside air, and the seat and seat supporting means as a diffusing and distributing means to eliminate blasts defendant was enabled to provide this novel result of very frequent complete change of air without the accompaniment of blasts or drafts, such as cold drafts. Fraver's novel combination also inherently provided the additional novel result of keeping the windows free of frost, mist and other condensation, since an enormous amount of air is introduced into the front seat chamber and distributed along the width of the car. In the words of respondent in its advertising,

> "Through continual ventilation, the Climatizer keeps windows free of frost, mist and other condensation."

Thus, by respondent's own admissions, the novel combination of elements used by respondent and claimed by

petitioner, provides improved, novel, highly useful, and unusual results which urged respondent to refer to the Climatizer combination (Pl. Ex. 15) as "the world's most advanced fresh air heating, ventilating and defrosting system." Petitioner fully agrees with these conclusions, and so did the Patent Office Examiner in allowing the Fraver claims over prior art of substantially the same scope as urged by respondent and the Court.

Petitioner's expert witness, Dr. Forstall, Professor at Carnegie Tech, one of this country's leading engineering universities, and an outstanding expert in heating and ventilating (R. 4a-6a), testified that in his opinion the Fraver combination provided various of the above new and useful results (R. 8a). He testified:

> "So that I think that these advantages, as disclosed in the patent seem to be a method of bringing the air in, distributing it evenly, slowing it down, before it enters the body proper, keeping it confined to the floor, or at least introducing it near the floor. That seems to be an element of novelty here, that the air enters in a diffused fashion with a lower velocity, perhaps than has been customary earlier."

Mr. Matulatias, petitioner's expert witness is probably the most qualified expert witness in the automobile heating and ventilating art (R. 11a-13a), formerly Chief Engineer of the Eton Manufacturing Company of Cleveland, one of the largest manufacturers of auto heaters, and who holds 20 to 25 patents as an inventor of automotive devices, particularly heating and ventilating systems. (R. 12a.) Perhaps ¼ of all outstanding automobile heating and ventilating systems embody his inventions. (R. 102) (R. 12a.) Mr. Matulatias also testified that in his opinion Fraver made an outstanding contribution to the art and that his com-

bination provided many new and useful results. (R. 12a, 13a, 16a.)

Dr. Forstall testified that each of the elements in claim 1 of the Fraver patent could be found in the accused Climatizer. (R. 53-56, R. 9a.) Likewise Mr. Matulaitas testified that every element of claim 1 could be found in the Climatizer (R. 15a, 16a, 17a, 111, 119) and that the patented device and Climatizer were "identical technically." (R. 17a, 119.)

Petitioner's expert witness, Mr. Klemplay, was formerly a Patent Examiner for seven years, and subsequently, a Patent Attorney for 15 years, as well as a professional engineer, and was thoroughly familiar with respondent's Climatizer since he drove a Studebaker equipped with one for more than a year. (R. 17a.) He also became very familiar with the cited art in the file wrapper and history of the Fraver patent. (R. 139, 18a.) He testified that in his opinion the Fraver patent was clearly valid and infringed by the accused Climatizer. (R. 18a.)

The above evidence clearly shows that claim 1 recites a novel and patentable combination of both new and old elements, and in the language of the recent A & P case, "the conjunction or concert" of elements does "contribute something", so that "the whole in some way exceeds the sum of its parts", therefore is patentable, and there are "unusual consequences from the unification of the elements", therefore invention.

Therefore the jury's conclusion of validity and infringement was certainly that of "reasonable" men and not capricious, since it is hardly fair to say that the Patent Office Examiners are not reasonable men, that all plaintiff's highly qualified experts are not reasonable men, and that

the 12 jurors are not reasonable men. On the contrary, the facts of the present case show invention of the highest order, therefore the presumption of validity which attaches to an issued patent should not be disturbed. For the above reasons, the jury's verdict of validity and infringement is strongly supported by the evidence.

Article 1 Sec. 8 of the Constitution was intended to "encourage" inventions and "promote progress" by granting patent rights as incentives to the great number of inventors who are needed for this purpose, not merely to one or two super-geniuses. How can invention be "encouraged" if Courts are permitted to exercise inventive effort to find ways of "reneging" on the solemn obligations of the patent grant?

As ably stated by this Court, speaking through Mr. Justice Reed very recently (March 1954) in Mazer *et al.* v. Stein *et al.*, 100 U. S. P. Q. 325, at 333:

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."

Petitioner spent many "sacrificial" *years* to develop and patent his invention while in poor financial circumstances. Added to this were recent "sacrificial" years paying for the present litigation, which he could ill-afford, because of a steadfast belief that the government gave him something of value and enforceable in issuing his patent. After a long and hard fought battle he obtained a well deserved favorable jury verdict. Then suddenly victory was turned

into defeat merely because the judge drew different factual inferences than the Patent Office, 12 jurors and 3 outstanding expert witnesses. Is this carrying out the Constitutional guaranty of a jury trial and its intent of "encouraging" invention?

Conclusion

The District Court's Order of May 1, 1953, setting aside the jury's verdict and judgment for petitioner, is clearly erroneous and stands as a very bad precedent which will materially and adversely affect the rights of the public and litigants of all pending and future patent jury cases. It is therefore respectfully submitted that this petition for certiorari to review and correct that judgment should be granted.

Respectfully submitted,

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April , 1954.

Appendix A

35 U. S. C. 67; R. S. 4919. Infringement of patent; damages for

"Damages for the infringement of any patent may be recovered by action on the case, in the name of the party interested, either as patentee, assignee, or grantee. And whenever in any such action a verdict is rendered for the plaintiff, the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs. (R. S. sec. 4919.)"

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35 U. S. C. 281 Remedy for infringement of patent

"A patentee shall have remedy by civil action for infringement of his patent. (R. S. 4919, 4921; 35 U. S. C. 1946 ed., 67, 70.)"

- - - - - - - - - - - - - - - -

35 U. S. C. 284 Damages

"Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.

"When the damages are not found by a jury, the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed.

"The court may receive expert testimony as an aid to the determination of damages or of what royalty

would be reasonable under the circumstances. (R. S. 4919, 4921; 35 U. S. C. 1946 ed., 67, 70.)"

- - - - - - - - - - - - - - - -

35 U. S. C. 103 Conditions for patentability; non-obvious subject matter

"A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made."

3

In the

Supreme Court of the United States

OCTOBER TERM, 1939

No. 912

IVAN N. FRAVEL, Petitioner,

v.

THE STUDEBAKER CORPORATION, Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

NO. 672

IVAN N. FRAVER, Petitioner,

v.

THE STUDEBAKER CORPORATION, Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Opinions Below

The opinion of the District Court for the Western District of Pennsylvania is reported at 112 F. Supp. 209. The opinion of the Court of Appeals for the Third Circuit is reported at 208 F. 2d 794.

Jurisdiction

Respondent admits the jurisdiction of this Court under 28 U.S.C., Section 1254 (1).

The Questions Presented

Petitioner's statement of questions allegedly presented by the record is grossly misleading, particularly as regards the action taken by the District Court and the bases or reasons for that action. The only question

stated by petitioner not subject to this criticism is No. 2; but that question is purely academic in this record. In reality, petitioner is merely seeking review by this Court of adverse decisions by a Master, the District Court and the Court of Appeals in an ordinary patent infringement action in which his patent was held invalid and not infringed by respondent.

The only question presented is whether the Court of Appeals erred in sustaining the action of the District Court in granting respondent's motion under Rule 50(b) of the Federal Rules of Civil Procedure for judgment notwithstanding the verdict where the Court was of the opinion that, as a matter of law, petitioner's patent was invalid and, even if valid, not infringed.

The decision of the Court of Appeals is not in conflict with any decision of any other Court of Appeals. It is in full accord with and not in conflict with the applicable decisions of this Court. It does not involve a question of Federal law which has not been settled by this Court, and it does not so depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Statement of the Case

Petitioner's "Statement of the Case" incorrectly and incompletely states the proceedings below.

Petitioner filed an action against respondent for infringement of patent No. 1,903,037, which issued March 28, 1933 and which had expired before trial. The patent relates to a car heating, cooling and ventilating apparatus which had not been adopted or used by anyone during

the entire life of the patent. Petitioner asked for a jury trial. On the ground that the action was complicated, the District Court referred the matter to a Special Master, an eminent member of the patent bar upon whom the parties agreed for the purpose. After a full hearing, the Special Master reported that petitioner's patent was invalid and not infringed by respondent and recommended that the action be dismissed. The action later came on for trial before a jury and the Special Master's report was read to the jury. Both parties adduced additional evidence and, at the conclusion of all of the evidence, respondent moved that a verdict be directed in its favor on the grounds that the patent was invalid and that respondent had not infringed. That motion was denied and the case was submitted to the jury. The jury found that Claim 1 of petitioner's patent was valid and had been infringed. Respondent seasonably moved that the verdict and judgment thereon be set aside and that judgment be entered for respondent in accordance with its motion for a directed verdict. After oral argument and exhaustive briefs, respondent's motion for judgment *n.o.v.* was granted on May 1, 1953, pursuant to an opinion filed simultaneously by the Honorable Rabe F. Marsh, in which he held, as a matter of law, that Claim 1 of petitioner's patent was invalid and not infringed.

Contrary to petitioner's assertions, the District Court did not have to weigh the credibility of witnesses or any dispute as to the meaning of scientific terms. The issue of validity required nothing but the comparison of written documents, namely, the plaintiff's patent with prior patents and trade publications, the authenticity of all of which was admitted. The evidence on infringement, con-

sisting of plaintiff's patent and the defendant's admitted structure, was not conflicting, except, as the District Court stated, in an interpretive sense and there was but one reasonable conclusion as to the proper verdict.

Petitioner appealed to the Court of Appeals for the Third Circuit, which affirmed the District Court's action in granting the motion for judgment *n.o.v.*

Argument.

Contrary to petitioner's contentions, the action of the Courts below in this case is in direct accord with applicable decisions of this Court and various Courts of Appeals. It is well established that, in the Federal Courts, the trial judge should direct the jury's verdict whenever the evidence is such that, without weighing the credibility of witnesses, there can be but one reasonable conclusion as to the verdict, or, as it is sometimes stated, that the trial judge should direct the verdict whenever the evidence preponderates so strongly in favor of one side that a verdict for the other, in the exercise of sound judicial discretion, would be set aside as against the manifest weight of the evidence: *Brady v. Southern Railway Co.,* (1943) 320 U.S. 476, 479-480; *Pennsylvania Railroad Co. v. Chamberlain,* (1933) 288 U.S. 333, 343; *Pennsylvania R. Co. v. Martin,* (3 Cir., 1901) 111 Fed. 586, 589.

On the issue of validity, it was the duty of the District Court to keep the jury's findings within reasoned rules and standards: *Capital Traction Company v. Hof,* (1899) 174 U.S. 1, 13-16. It was the duty of the District Court to see that the proper standard of invention was applied, as a matter of law, and this is exactly what the

District Court did. In its opinion, the District Court stated (p. 211):

> "Therefore, when we scrutinize the patent broadly as plaintiff would have it done, it is evident in the light of the prior disclosures, that the standards of invention were not met and that his patent was anticipated, lacks novelty, and, in 1933, was obvious to those skilled in the art."

With reference to the other possible construction, the District Court stated (p. 212):

> "Thus when plaintiff's combination patent is scrutinized under the strict construction, it continues to appear that no distinct contribution has been made in the art of car ventilating and that no new or unusual result or invention has been shown. Therefore, as a matter of law, the verdict based on that construction should be set aside."

As early as 1884, this Court, in *Mahn v. Harwood et al.*, 112 U.S. 354, held the question of validity or "patentable invention" to be a matter of law for the Court. In that case, the Court stated (pp. 358-59):

> "In cases of patents for inventions, a valid defence not given by the statute often arises where the question is, whether the thing patented amounts to a patentable invention. This being a question of law, the courts are not bound by the decision of the commissioner, although he must necessarily pass upon it. See *Brown v. Piper*, 91 U.S. 37; *Glue Co. v. Upton*, 97 U.S. 3; *Dunbar v. Myers*, 94 U.S. 187, 197-199; *Atlantic Works v. Brady*, 107 U.S. 192, 199; *Slawson v. Grand St. Railroad Co.*, 107 U.S. 649, 652; *King v. Gallun*, 109 U.S. 99, 101."

The latest pronouncement on this subject by this Court is in *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corporation,* (1950) 340 U.S. 147, in which this Court reversed concurrent holdings of the Courts below on the question of patentable invention, holding that the lower Courts' decisions on the issue "cannot stand as a matter of law." This Court held that the lower Courts had failed to apply the proper "standard of invention." In the concurring opinion of Mr. Justice Douglas and Mr. Justice Black, it was pointed out that this standard of patentability is a constitutional standard and, hence, a question which must be decided by the Court. In this connection, the concurring opinion states (pp. 155-56):

> "The standard of patentability is a constitutional standard; and the question of validity of a patent is a question of law. *Mahn v. Harwood,* 112 U.S. 354, 358. * * * The Court now recognizes what has long been apparent in our cases: that it is the 'standard of invention' that controls. That is present in every case where the validity of a patent is in issue. It is that question which the Court must decide. No 'finding of fact' can be a substitute for it in any case. The question of invention goes back to the constitutional standard in every case. We speak with final authority on that constitutional issue as we do on many others."

The decisions of the lower Courts in the case at bar are not in conflict with pertinent decisions of other Courts of Appeals. This is shown by:

Himes v. Chadwick, (9 Cir., 1952) 199 F. 2d 100;

Cutter Laboratories, Inc. v. Lyophile-Cryochem Corp., (9 Cir., 1949) 179 F. 2d 80;

Fischer & Porter Co. v. Brooks Rotameter Co., (D.C. E.D. Pa., 1952) 107 F. Supp. 1010;

Packwood v. Briggs & Stratton Corp. et al., (3 Cir., 1952) 195 F. 2d 971;

Patent Scaffolding Co., Inc. v. Upright Inc. et al., (9 Cir., 1952) 194 F. 2d 457;

Ryan Distributing Corp. v. Caley, (3 Cir., 1945) 147 F. 2d 138;

McIlvaine Patent Corp. v. Walgreen Co. et al., (7 Cir., 1943) 138 F. 2d 177, 44 F. Supp. 530;

Connors et al. v. Ormsby, (1 Cir., 1906) 148 Fed. 13.

The action of the lower Courts in entering judgment *n. o. v.* on the issue of infringement is likewise in accord with the applicable decisions of this Court. On this issue, the District Court stated (pp. 212-13):

"But assuming, as the jury found, that the patent as strictly construed by the court was valid, we believe it would still be necessary to enter judgment n. o. v. for the defendant for the reason that the evidence does not warrant a verdict of infringement. See Black Diamond Coal Mining Co. v. Excelsior Coal Co., 1895, 156 U.S. 611, 15 S. Ct. 482, 39 L. Ed. 553; Singer Mfg. Co. v. Cramer, 1904, 192 U.S. 265, 24 S. Ct. 291, 48 L. Ed. 437; Ryan Distributing Corp. v. Caley, 147 F. 2d 138, supra; Western Electric Co. v. Robertson, 2 Cir., 1905, 142 F. 471; Hurin v. Electric Vacuum Cleaner Co., 6 Cir., 1924, 298 F. 76; McRos-

key v. Braun Mattress Co., 9 Cir. 1939, 107 F. 2d 143; Fischer & Porter Co. v. Brooks Rotameter Co., 107 F. Supp. 1010, supra. The principle to be gathered from these cases is that where the credibility of witnesses is not involved, the meaning of scientific terms is not in substantial dispute, and the evidence on infringement is not conflicting, except in the interpretive sense, the question of infringement, even though one of fact, is for the court and not for the jury. We think such a case is presented here."

As is apparent from the above quotation, the District Court predicated its action on this Court's decision in *Black Diamond Coal Mining Company v. Excelsior Coal Co.,* (1895) 156 U.S. 611, in which this Court held (p. 618):

"For the reasons given above, we think the court erred in its interpretation of the patent. If there was any invention at all disclosed, it was in the use of the reservoir and the screening device, and without expresssing an opinion upon this point of patentability, it is clear that no infringement was involved in the use of defendant's hopper and chute, with or without a solid bottom, if for no other reason, because it lacked the reservoir of the plaintiff's patent.

"There was no question to go to the jury in the case, and the court should have directed a verdict for the defendant."

Thus it is clear that this Court, as early as 1895, held that, where the evidence does not warrant a verdict of infringement, it is within the power of the Court to direct a verdict for the defendant.

The District Court also relied upon this Court's decision in *Singer Manufacturing Company v. Cramer,* (1904) 192 U.S. 265, wherein the Court stated (p. 275):

> "As in each of the patents in question it is apparent from the face of the instrument that extrinsic evidence is not needed to explain terms of art therein, or to apply the descriptions to the subject matter, and as we are able from mere comparison to comprehend what are the inventions described in each patent and from such comparison to determine whether or not the Diehl device is an infringement upon that of Cramer, the question of infringement or no infringement is one of law and susceptible of determination on this writ of error. *Heald v. Rice,* 104 U.S. 737; *Market Street Cable Ry. Co. v. Rowely,* 155 U.S. 621, 625."

That the District Court's action is in accord with applicable decisions of the various Courts of Appeals is apparent from the following cases:

Himes v. Chadwick, (9 Cir., 1952) 199 F. 2d 100;
Patent Scaffolding Co., Inc. v. Upright, Inc. et al., (9 Cir., 1952) 194 F. 2d 457;
Ryan Distributing Corp. v. Caley, (3 Cir., 1945) 147 F. 2d 138;
McIlvaine Patent Corp. v. Walgreen Co. et al., (7 Cir., 1943) 138 F. 2d 177; 44 F. Supp. 530;
McRoskey v. Braun Mattress Co., (9 Cir., 1939) 107 F. 2d 143, 147;
Western Electric Co. v. Robertson et al., (2 Cir., 1905) 142 Fed. 471;
Hurin v. Electric Vacuum Cleaner Co., Inc., (6 Cir., 1924) 298 Fed. 76.

In his brief, petitioner has devoted many pages to an argument to the effect that the evidence supports the jury's verdict on the issues of validity and infringement. We shall not trouble the Court to reply to petitioner's arguments in this regard, since it is clear that the action of the District Court and the Court of Appeals is in accord with the applicable law as enunciated by this Court and that no real ground for review exists.

Conclusion

We submit that the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

NO. 672

IVAN N. FRAVER,
Petitioner,

v.

THE STUDEBAKER CORPORATION,
Respondent.

REPLY BRIEF FOR PETITIONER

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IN THE

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OCTOBER TERM, 1953

NO. 672

IVAN N. FRAVER,
Petitioner,

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THE STUDEBAKER CORPORATION,
Respondent.

REPLY BRIEF FOR PETITIONER

Petitioner is not seeking a review of findings of fact of any lower court since the jury was the fact finder. Petitioner is fully satisfied with the verdict of the jury of validity and infringement, but is dissatisfied with the court's setting aside of this verdict for alleged matters of law which, in reality, are clearly of fact.

Respondent vaguely objects to petitioner's statement and questions presented but fails to point out a single instance of error in any of petitioner's statements or references to the record in support thereof for the simple reason that they are true. Respondent erroneously fails to state its own adoption and commercially successful use of the invention. It admitted, at the pre-

trial conference, that it sold over 8 million dollars worth of accused units at a profit of about ¾ million dollars (R. 40-41).

The basic issue in this case is whether it is the province of the jury or court to determine the question of whether or not admitted differences or "variations" between a patented novel combination and the prior art are such as would have been obvious to a person having ordinary skill in the art. The District Court treated this question as one of law, instead of fact, therefore, in direct conflict with the consistent decisions of this court (Pet. br. pp. 14, 18).

Respondent cites (p. 4) Brady v. Southern Railway Co. which is not apposite, being a negligence case wherein this Court merely held that there was not even a "scintilla" of evidence on the crucial question of negligence of the carrier for consideration by the jury. This court said (p. 479) "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case the jury." And (at p. 480) "Our conclusion is that there is failure to show in the record any negligence of the carrier. * * *" Therefore, this case, also Pennsylvania Railroad v. Chamberlain and Pennsylvania Railroad Co., v. Martin, merely relate to a complete lack of evidence that could support a jury's verdict. Such is not the case here, nor has it been asserted by the District Court.

It certainly cannot be fairly stated that the evidence was entirely one-sided so that the only reasonable verdict could have been for respondent, or that it did not require weighing of the credibility of witnesses. The

jury for almost two weeks heard much conflicting testimony of expert witnesses of petitioner and respondent (pet. br. p. 16) including the Master's report; it examined, and heard extrinsic testimony of respondent's expert concerning, many prior patents (R. 404-477) and viewed several physical exhibits; it witnessed physical demonstrations and tests in open court clearly showing the identity of operation of the elements of petitioner's and respondent's combinations, particularly the chambers (R. 376-379). The court, in view of this conflict in testimony, submitted the questions of "validity" and "infringement" for determination by the jury, and all twelve jurors found, on their oaths, that claim 1 was valid and infringed; that the elements of the patented and accused combinations were identical, or at least equivalent, in accord with this Court's recent (1950) Graver v. Linde decision (pet. br. pp. 20-21). All three of petitioner's experts found that the accused device clearly met the terms of claim 1, therefore was an infringement. (R. 42-157). Likewise the Patent Office considered petitioner's combination patentable after considering and discarding the same Cooke patent which the Court considered the most pertinent prior art (p. 211; R. 32a).

On the issue of validity, respondent cites (p. 4) Capital Traction Co. v. Hoff, a negligence case, which is not pertinent.

The District Court casually mentioned, among other things, (p. 211) that the standards of invention were not met. But the *only* reasons given for this conclusion were *factual* and not matters of *law*. More specifically, the Court previously stated, as its reasons for this conclusion (p. 211), that the claim and every component thereof was

"substantially" anticipated and "obvious to one skilled in the art", citing in support thereof Cook, Cooke, Crowther and Pickwick Bus as the most pertinent prior art. But the Court admitted their failure to meet the terms of claim 1 by saying:

> "The only noticeable variation is that the space under Fraver's seats is enclosed by the floor, seat cushion and the supporting means, the latter (he argues) covered by permeable material; but this variation in the underseat construction could scarcely be considered as a contribution to the art."

Then the Court admitted a still further "variation" by saying "It is true that the prior art last mentioned is disclosed on streetcars etc." There were also additional "variations" (pet. br. p. 32). Then the Court concluded by saying (p. 211) *"Therefore,* * * * it is evident in the light of the prior disclosures that the standards of invention were not met and that his patent was anticipated, lacks novelty, and, in 1933, was obvious to those skilled in the art." (Emphasis added) Thus the Court treated the factual questions of whether the device was a "contribution to the art" and whether "obvious to persons skilled in the art" as questions of law rather than of fact. This is clear error and contrary to the decisions of this Court (pet. br. pp. 14-18) including the cited recent decision of Thomson Co., v. Ford Motor Co., in which this Court unequivocally held:

> "The question whether an improvement requires mere mechanical skill or the exercise of the faculty of invention, is one of fact; and in an action at law for infringement is to be left to the determination of the jury."

Petitioner does not dispute that respondent's invention must come within the Constitutional provisions of Article 1, Section 8. This was to "encourage" (not discourage) invention by giving Congress power "to promote the progress of science and useful arts by securing * * * to authors and inventors the exclusive right to their respective writings and discoveries." The word "science" meant general knowledge or learning (L:scire) and not pure science as known today, and applied only to the copyright provision, whereas discoveries (or inventions) at that time, were called "useful arts". Certainly petitioner promoted the progress of the useful arts even by respondent's own undisputed admissions that the patented combination constitutes the "world's most advanced fresh air heating, ventilating and defrosting system" and by respondent's own admissions, of many listed new and unusual results of the novel combination (Pl. Ex. 15, Appendix 2) (R. 32a-34a). Moreover, all three of petitioner's experts also testified accordingly.

Petitioner's invention also clearly meets the Statutory requirements. The Patent Act of 1952, Section 101 states:

> "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title. (R. S. 4886; 35 U.S.C., 1946 ed., 31.)

Section 103 (pet. br. p. 40) summarizes the existing law on "invention" by saying that a patent may not be

obtained "if the differences between the subjectmatter sought to be patented and the prior art are such that the subjectmatter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subjectmatter pertains." Thus the question of "invention," as always, turns on the factual question of "obviousness."

The District Court did not assert lack of compliance with any of the above Constitutional or statutory requirements. Instead, the court treated the question of "obviousness" to persons skilled in the art as a question of law, instead of one of fact, and usurped the function of the jury in making this determination, directly contrary to the decisions of this Court. Now, if the recently enacted Patent Act of 1952 is not in accord with the Constitution, or is an incorrect statement of the law, this Court should declare it unconstitutional because certainly it is considered as summarizing existing law and as the proper guide for determining patentability.

Respondent challenges the correctness of consistent decisions of this Court for over 150 years which hold questions of invention (or obviousness) and infringement as questions of fact for determination by the jury. Respondent cites Mahn v. Hardwood, asserting that this Court, back in 1884, held "patentable invention" to be a matter of law for the court. But since the many decisions of this Court holding this question as one of fact were later in time (pet. br. pp. 14, 15) they clearly represent the present law.

Respondent misconstrues the A & P case (p. 6) as holding that the question of patentable invention is one of law. On the contrary the *majority* opinion held that

resolving conflicting testimony on invention is a determination of fact. While it is true that the concurring opinion of Justices Douglas and Black held the question of validity as one of law, citing Mahn v. Harwood, *supra,* this can hardly be said to be a clear statement that this Court has overruled its consistent holdings that this is a question of fact.

But regardless whether validity or infringement are questions of law or fact, or mixed law and fact, the more important and outstanding issue in this case is whether the court may disregard the verdict of a jury, supported by testimony of at least three outstanding expert witnesses of petitioner, to the effect that petitioner's combination was novel and constituted a very significant contribution to the art, and that the accused structure clearly met the terms of the claim and was technically identical to and an infringement of petitioner's patent. That their views were "reasonable" is emphasized by the fact that they coincide with the views of the Patent Office on exactly the same issue concerning pertinency of the Cooke patent which the Patent Office discarded but which the Court considered anticipatory and as the most pertinent prior art. Moreover it is supported by respondent's own admissions hailing the combination as "the world's most advanced fresh air" system (Pl. Ex. 15) and listed many new and unusual results of the combination. (pet. br. pp. 32-34).

Therefore, it cannot be fairly said that the evidence was so one-sided that the jury's verdict of validity and infringement could not possibly be considered reasonable.

Respondent has not cited a single decision of this Court, nor does it appear one exists, justifying a court in resolving conflicting evidence on invention or obviousness and vacating a jury's verdict of validity or infringement when supported by evidence. Respondent cites (pp. 6, 7) decisions of other Courts of Appeals and further showing conflict. However, each case has its own peculiar facts. None has gone as far as the court in the present case. For instance, in Packwood v. Briggs and Stratton, the patented combination was admittedly an old one and fully shown by a single prior patent to Knight. The real question was whether a new "use" of an old combination is patentable. But the Statute does not provide for new "uses," but merely new "inventions." The jury in that case brought in a *qualified* verdict of validity "as to lawn mowers only" which would have made Briggs and Stratton an infringer even though it followed the teachings of an expired patent to Knight, thus raising a question of law.

Cutter Laboratories v. Lyophile-Cryochem, cited by respondent, upheld the jury's verdict of validity and infringement as to a number of claims because the evidence was not one-sided.

Respondent asserts (p. 3) "The issue of validity required nothing but the comparison of written documents, namely, the plaintiff's patent with prior patents and trade publications, the authenticity of all of which was admitted." But the instant case does not involve merely the comparison of legal documents to note their exact identity, such as the renewal and original patent applications in Heald v. Rice, cited by respondent. When patented structures are compared which are admittedly

different or have, in the words of the court, "variations," over the prior art, this is not a matter of comparison of *documents* but of *structures,* involving not only indentity but equivalence of operation, which are clearly questions of fact. In Battin v. Taggert, cited in petitioner's brief, this Court stated (p. 84): "There are other questions of fact which come within the province of a jury; such as the identity of the machine used by the defendant with that of plaintiff's, or whether they have been constructed and act on the same principle." See also *Tyler v. Boston,* 74 US 327, 330, Bischoff v. Wethered, Tucker v. Spalding, and Turril v. Railroad Co., also cited, wherein this Court held that the matter of comparing a patent in suit with prior patents is one of fact for the jury and not one of law for the court. In the Bischoff case this Court explained (p. 816): "This view of the case is not intended to, and does not, trench upon the doctrine that the construction of written instruments is the province of the court alone. It is not the *construction of the instrument* but the *character of the thing invented,* which is sought in questions of identity and diversity of inventions."

And to show that this is still considered the law the recent decision of *B. F. Sturtevant Co. v. Mass Hair and Felt Co.,* 122 F2 900 (CA 1-1941) c.d. 315 US 823) held the question of patentability as one of fact, citing *Thomas Spot Welder v. Ford Motor Co.,* 265 US 445, and held (p. 908):

> "The question of priority of invention, even when the attempt is made to invalidate a patent by showing an earlier one rather than by merely showing prior general knowledge and use, is, like the question of patentable invention, one of fact.

> Walker on Patents, Deller's Edition Sec 61, United States v. Esnault-Petterie, 303 US 26, 30, 31. The reason for this is that 'It is not the *construction of the instrument,* but the *character of the thing invented,* which is sought in questions of identity and diversity of inventions.' Bischoff v. Wethered, 9 Wall 812, 76 US 812, 816."

The latest pronouncement by this Court that infringement and equivalency are questions of fact is in Graver v. Linde (pet. br. pp. 20, 21) decided 1950 in which this Court held "If the accused matter falls clearly within the claim, infringement is made out and that is the end of it." (All three of petitioner's experts testified that the accused device fell clearly within claim 1.) This Court then went on to say that there is another test in the event the accused matter does not fall within the terms of the claim, namely, whether the elements are "equivalent," which this Court held to be a "finding of fact" which could be proved "through testimony of experts or others versed in the technology". This Court said "Like any other issue of fact, final determination requires a balancing of credibility, pursuasiveness and weight of evidence." This Court also held therein that the doctrine of equivalents operates in favor of the patentees of both pioneer and secondary inventions, and that "equivalency" is not a prisoner of formula requiring complete identity for every purpose and in every respect. The jury heard considerable testimony of petitioner's experts concerning identity, or equivalency, of the various elements of the patented and accused combinations: Extrinsic evidence was called upon to explain terms of art such as "chamber" (R. 47-48, 50).

There was considerable dispute of fact concerning the operation of the accused device. (pet. br. p. 16) The credibility of witnesses was very much involved on the question of whether the accused device had a "chamber" or its equivalent. (R. 54, 110-111, 118-120) Respondent's expert initially contended that very little air entered the accused seat (R. 291) but a demonstration and tests in open Court proved otherwise (R. 376-377). He was then forced to admit that air filled the seat chamber, but then contended that it was stagnant (R. 378). Contrary to this respondent's auto heater expert testified that such air was not stagnant but swirled in the chamber before discharging into the car (R. 150). This and other conflicting testimony was very material to the question of identity of the principles of operation of the two devices, and whether the accused device had the same elements as the patented combination or their equivalents.

But the District Court, in the case at bar, treated the findings of infringement and equivalency as findings of "law" and usurped the jury's functions by making its own factual determinations thereof and by denying petitioner any equivalents contrary to the ruling of this Court.

Respondent (br. p. 10) evades the basic issue of whether there is evidence which can support the jury's verdict of validity and infringement, for the simple reason that there is an abundance of such evidence as petitioner pointed out (pet. br. pp. 27-38) (Petition for Re-hearing for appellant, R. 110-112).

Conclusion.

This Court has *never* accepted for review and set aside a jury's verdict of validity and infringement, supported by evidence, merely because it felt that the invention would have been obvious to those skilled in the art, nor has this Court *ever* held, as did the District Court, that obviousness is to be determined as of the date of issuance of the patent rather than when the invention was made. Therefore important Federal questions are presented which should be settled by this Court since they affect all pending and future patent cases, particularly jury cases.

Respectfully submitted,

WILLIAM J. RUANO,
1530 Park Building,
Pittsburgh 22, Pennsylvania,
Counsel for Petitioner.

May 4, 1954

[fol. 101] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

347 U.S.
FRA-GE
15

No. 11,144

IVAN N. FRAVER, Appellant

v.

THE STUDEBAKER CORPORATION

STIPULATION EXTENDING TIME FOR FILING OF APPELLEE'S BRIEF—Filed September 25, 1953

Due to the absence in Europe of William H. Webb, Esquire, Pittsburgh patent counsel for the appellee in the above-entitled case, it is hereby stipulated and agreed that the time for filing and serving the appellee's brief is extended until and including November 2, 1953.

William J.Ruano, Counsel for Appellant; William H. Eckert, Smith, Buchanan, Ingersoll, Rodewald & Eckert, Counsel for Appellee.

Approved: William H. Hastie, Circuit Judge, September 25, 1953.

[fol. 102] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,144

IVAN N. FRAVER, Plaintiff-Appellant

v.

THE STUDEBAKER CORPORATION

Appeal from the United States District Court for the Western District of Pennsylvania

Argued December 7, 1953

Before Kalodner, Staley and Hastie, Circuit Judges

OPINION OF THE COURT—Filed December 16, 1953

Per Curiam:

The plaintiff brought suit in the United States District Court for the Western District of Pennsylvania for in-

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fringement of his patent on car heating, cooling and ventilating means. The case was tried before a jury which returned a general verdict in his favor in the sum of $79,250 with costs. Judgment was entered on this verdict.

Pursuant to defendant's motion under Rule 50 of the Federal Rules of Civil Procedure, the District Court, by Order, set aside the jury's verdict and directed judgment [fol. 103] in favor of the defendant. The District Court's action was premised on its determination that plaintiff's patent was invalid and moreover that it was not infringed by the defendant's device.

After examining the briefs and the record and having considered the arguments of counsel, we are convinced that the District Court did not err. We need add nothing further to what has been so well stated by Judge Marsh in his analysis of the evidence and the applicable law, and accordingly, the Order of the Court below will be affirmed upon his opinion.

[fol. 104] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,144

IVAN N. FRAVER, Appellant

vs.

THE STUDEBAKER CORPORATION

On Appeal from the United States District Court for the Western District of Pennsylvania

Present: Kalodner, Staley and Hastie, Circuit Judges.

JUDGMENT—December 16, 1953

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order and judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

[File endorsement omitted.]

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IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 11,144

IVAN N. FRAVER,
Plaintiff-Appellant,

vs.

THE STUDEBAKER CORPORATION.

PETITION FOR REHEARING FOR APPELLANT

APPEAL FROM ORDER AND JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA IN CIVIL ACTION 7828.

WILLIAM J. RUANO,
Attorney for Plaintiff-Appellant,
1530 Park Building,
Pittsburgh 22, Pennsylvania.

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IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 11,144

IVAN N. FRAVER,

Plaintiff-Appellant,

VS.

THE STUDEBAKER CORPORATION.

PETITION FOR REHEARING

May it please the Honorable Court:

Appellant respectfully prays for a rehearing for the following reasons:

A shocking injustice has been done to plaintiff. He was not only deprived of a hard fought and justly won verdict of $79,250, following about two weeks of trial, but, to add insult to injury, this court imposed upon him defendant's "costs" which, among other things, includes 166 pages of brief and appendices amounting to $435. Defendant lavishly printed 100 pages of testimony alone (four times as much as appellant) which, it is felt, included "unnecessary matter" within the meaning of Rule 35 (4) of this Court. Many of the exhibits in Appellee's Appendix Vol. II are unnecessary duplicates of those in Appellant's Appendix 2. But aside from this, appellant is an individual of ordinary

means, earning only $1800 a year during the development of his invention, as the record shows (R. 220). He was financially unable even to pay counsel for his services in this appeal since the costs of printing his briefs were extremely burdensome. Nevertheless counsel undertook the appeal because of his strong conviction, which he steadfastly holds, that, according to the law and facts, the jury's verdict should stand. It is significant that the District Court did *not* include "costs" in its judgment *N. O. V.* (29a).

In view of appellant's financial circumstances, coupled with the fact that the jury returned a verdict in favor of appellant, and the further fact that the Patent Office discarded, as *not* pertinent, the very patents most strongly relied upon by the District Court, such as the Cooke patent (which is representative of the four patents to Cook, Cooke, Crowther and Pickwick Bus) (32a), it is respectfully prayed that the very least showing of justice by this court would be to eliminate the item of "costs" in its judgment of December 16, 1953. Must appellant be penalized for asking the court to be consistent with the Patent Office Examiner in discarding the Cooke patent and others cited such as Alkire, Williams, Roemer, Beucher, (reply br. p. 19), as the Examiner has done, as not pertinent? It is no wonder the Patent Office discarded these patents since they involve impractical systems never used commercially, having dangerous obstructions, as vanes near the doors, which permit rain to enter seats as distinguished from an upwardly extending pipe entering Fraver's chamber which prevents this,—also they require special constructions and cutting up of the seat and car as compared to Fraver's combination which does not and is completely concealed.

Must appellant be penalized for asking the Government to abide by the terms of its written contract (granted claims) instead of rewriting them as the court has done by adding unexpressed limitations?

Secondly, a clear and glaring error of law was made by the District Court in holding throughout its Opinion (on page 32a and again on page 33a) that *in 1933* (the issue date of the patent in suit) appellant's invention was obvious to those skilled in the art. This is contrary to the most elementary principles of patent law, since the factual question of obviousness must be decided as of the *date the invention was made,* that is, on or before 1931. It is clear error to make this determination in 1933. A statement of the law that has existed for over a century is found in 35 USC 103 which sets forth, as the criterion of "invention," whether "the subject matter as a whole would have been obvious *at the time the invention was made* to a person having ordinary skill in the art to which said subject matter pertains." (Emphasis added.) The court further clearly erred by reexamining the facts and usurping the jury's function in determining this matter of obviousness at all, since it is a question of *fact* for the jury, and not of law for the court as recently reiterated by the Supreme Court in Thomson v. Ford Motor, 265 U. S. 445, 446 (br. p. 9). The court further erred in making its own decision of obviousness in spite of the fact that there was *no evidence whatsoever* offered by defendant relating to obviousness to those skilled in the art, such as concurrent invention by others. The court had no power to try the decided factual issues of validity and infringement *de novo* and deprive plaintiff of his constitutional right to have these issues tried by a jury.

The court frankly admitted that the four basic references to Cook, Cooke, Crowther and Pickwick bus do not show one of the essential features of appellant's combination, namely the chamber formed by the seat and seat supporting means (32a). (Actually they also do not show various other features of the combination) (br. pp. 30-31). The court, however, went on to say that "this variation in the under seat construction could scarcely be considered as a contribution to the art." But this conclusion is directly contrary even to defendant's own admissions (Plaintiff's Exhibit 15) wherein defendant acclaimed the combination as "the world's most advanced fresh air" system for autos and listed many unusual results provided by the combination. Therefore it is plain that the court's holding of lack of contribution to the art is directly contrary to the evidence. Moreover the court's decision as to obviousness was based merely on its gift of hindsight after learning of appellant's invention, which is the wrong test as held repeatedly by the Supreme Court and recently reiterated in the Ray-O-Vac case (br. p. 35).

The fundamental issue in this case is whether a judge can substitute his own opinion for that of the jury on the question of obviousness of changes of prior art patented structures or the manner of their combination, and thus usurp the jury's function in determining this issue. That he cannot and that this matter is for the jury was clearly stated by the Supreme Court in Thomson v. Ford Motor Company, *supra* (br. p. 9) holding that this question "is to be left to the determination of the jury." Clearly, in any patent suit that is tried by a jury a judge could indirectly deprive a patentee of his constitutional rights to trial by jury merely by asserting that he does not agree with the

conclusions of the jury on this point. These are merely honest differences in judgment or opinion which exist in any fact finding, and are not questions of law, nor do they involve "clear error" or "caprice in fact finding" as contemplated in Rule 50b as the *sole* basis for granting judgment *N. O. V.* How can it be fairly said that the finding of validity was "clearly erroneous" when the file wrapper record of the patent shows that the Patent Office considered the very patents the court urges as most pertinent and nevertheless discarded them in favor of allowance of the patent? Is it fair to say that the Patent Office's holding is not that of "reasonable" minds, when the Patent Office experts actually represent the Government? While a judge is entitled to his own opinion as to obviousness this is clearly not the proper basis *for setting aside a verdict,* particularly after a motion for directed verdict was refused and the questions of validity and infringement were submitted to the jury for determination. A patent jury trial is merely a mockery as far as constitutional rights guaranteed by the Seventh Amendment of the Constitution are concerned, when a judge can substitute his own judgment on the matter of obviousness for that of the jury in the absence of a clearly anticipating reference specifically showing the entire combination (as in the Packwood case [reply br. pp. 9-12]), which even defendant's patent expert admits does not exist (R. 443).

Therefore the specific combination was admittedly "new" as well as "useful" (Pl. Ex. 15) meeting the requirements of the Statute, 35 USC 101 stating "Whoever invents or discovers any new and useful * * * machine, manufacture * * * or any new and useful improvement thereof, may obtain a patent * * *." The only other require-

ment of the Statute is whether an "improvement" or "invention" is involved. But "invention" is defined in Sec. 103 as involving solely the question of whether "the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art", which the Supreme Court has consistently held is a question of fact for the jury. Thus the statutory or constitutional standards have been clearly met and the jury made the factual finding that the invention was "new" and "useful" and was "not obvious" at the time it was made, as clearly supported by the evidence.

In the case at bar there were numerous inferences from the evidence sufficient to enable a reasonable man to determine that Fraver's novel combination was not obvious to a person having ordinary skill in the art and was truly inventive.

The first kind of evidence is the presumption of validity attendant the issuance of the patent (especially after consideration of the same patents which the court now deems pertinent but which the Patent Office discarded as not pertinent). Diamond Rubber v. Consolidated Rubber (1911) 220 U. S. 428.

A second form of evidence warranting the same conclusion is found in the fact that the numerous skilled men in the automotive art for over 40 years failed to conceive Fraver's combination in spite of a crying need for this combination, coupled with the fact that after Fraver disclosed his patent to defendant, defendant adopted it and completely discarded prior used devices. Goodyear v. Ray-O-Vac, (1944) 321 U. S. 275, 278.

A third form of evidence from which the jury could conclude the presence of invention is that although the prior art was freely available to defendant, defendant instead chose to adopt Fraver's combination. New York v. Consolidated Rubber Tire Co., 220 U. S. 428, 441.

A fourth form of evidence augmenting the normal presumption of validity exists in the admitted "enthusiasm" of public acceptance of Fraver's combination when placed on the market by defendant (R. 285) and the admitted commercial success reflected in profits of almost a million dollars, and sales of about $8,300,000 in auto air conditioning equipment in a short period of three years (R. 40, 41) Goodyear v. Ray-O-Vac, *supra.*

The fifth and final form of evidence is found in the fact that defendant had to cite over 30 prior art patents and publications in an attempt to make out lack of novelty, none of which, admittedly, shows defendant's combination (R. 443). That such a large number of prior art patents is of itself evidence, either that none of them is nearly like the invention of patentee, or that many prior attempts, shown in the numerous prior devices, were unsuccessful in solving the problem, appears in such cases as Ackermans v. General Motors Corp., 202 F. (2d) 642, 645; (CA-4, 1953) (cert. den. 1953).

Such reasonable men as the Supreme Court justices in writing the above decisions have concluded that invention was present in a host of cases based upon facts analogous to those in the case at bar. In fact, in many of the above decisions, such as the Ray-O-Vac case, the differences between the closest prior art and the patent in suit were smaller than in the case at bar. Certainly it can hardly be said that the conclusions of the Patent Office Examiners

together with that of the 12 jurors and the various expert witnesses of plaintiff are not those of "reasonable" men and are "clearly erroneous" or, as stated by Judge Hastie in the Packwood case, involve "gross mistake or caprice in fact finding." The evidence as to obviousness is slight, in fact non-existent since *no* evidence was presented in an endeavor to show obviousness of plaintiff's combination. It is wrong to judge obviousness merely by hindsight swayed by apparent simplicity of an invention after defendant has carefully combed the prior art to show what was known. Such viewing after the event, as the court has done in the case at bar, was condemned by the Supreme Court in the Ray-O-Vac case wherein it said "Viewed after the event the means Anthony adopted seem simple and such as should have been obvious to those who worked in the field, but this is not enough to negative invention." In any event, the question of "obviousness" is clearly one of *fact* for the jury, as recently reiterated by the Supreme Court in the Thomson v. Ford, *supra*. And even if the evidence were somewhat balanced it must be remembered that 35 USC 282 states that "the burden of establishing invalidity of a patent shall rest on a party asserting it" and this alone should tip the scales in favor of appellant since defendant presented no new issues other than those decided by the Patent Office in plaintiff's favor.

Apparently this court, misled by statements made by defendant at the trial, has an erroneous impression concerning the holdings in the A & P case and the present law concerning patents on combinations of mechanical elements. Contrary to defendant's assertion, the *majority opinion* in the A & P case does *not* hold that a combination claim can be anticipated merely by showing the individual elements to be separately old in the prior art and having

functions as they had before, because if this were true, even the classic mechanical inventions could not survive the test. The only requirement in the A & P case is (p. 305) "the conjunction or concert of known elements must contribute something; only when the whole in some way exceeds the sum of its parts is the accumulation of old devices patentable." This is clearly an acknowledgment that even old or "known" elements may form a patentable combination so long as the combination produces an improvement because of the fact of combination. After all, practically all mechanical inventions (and they constitute most of the inventions) are made up of previously known elements having previously known functions. That such combinations are still considered patentable by the Supreme Court is evidenced by the very recent cases in which the Supreme Court upheld validity of combinations of mechanical elements which, individually, had only previously known functions. Just over a month ago (Nov. 16, 1953) the Supreme Court denied certiorari and thus upheld validity of a gas lift flow valve, involving a combination of "admittedly" old elements each of which performed the same function as in the prior art, in Guiberson Corp. v. Garrett Oil Tools, 98 USPQ 165; 205 F. 660 (CA5-1953) wherein Judge Hutcheson, in the opinion of the Court of Appeals stated (p. 166) "Plaintiff admitted that its patent was a combination patent, all of the elements in which were old." Likewise the Supreme Court denied certiorari and very recently upheld other cases involving combinations of old mechanical elements performing the same functions as in the prior art, but wherein the assembly provided an improvement, but not of a "surprising" or "extraordinary" nature, since neither of these requirements is imposed by the A & P case (br. p. 12), which cases are as follows:

In Livesay Industries v. Liversay Window Co., 96 USPQ 285 (CA5-1953) the Supreme Court denied certiorari on Oct. 19, 1953 and upheld the validity of a mechanical combination of a precast concrete window frame construction including well known channel guides, pintles etc. having their previously known functions.

In Russell Box Co. v. Grant Paper Box Co., 86 USPQ 337, (CA3-1950) cert. den. Oct. 12, 1953, the Supreme Court upheld this court's decision holding validity of a laminated paperboard construction for boxes for bakery products wherein the general combination and individual elements were well known and wherein the result of the combination was merely an improvement in moisture-proofness as compared to that of prior combinations.

Furthermore as stated in Faulkner v. Gibbs, 170 F. 2d 34, 38 (CA9-1948), (affirmed by the Supreme Court in 338 U. S. 267).

> "What constitutes invention as distinguished from mere aggregation is a question of fact."

In the same decision the Supreme Court in affirming said (p. 268):

> "the patent was sustained because of the fact of combination rather than the novelty of any particular element."

The Supreme Court recently stated in Thomson v. Ford Motor, (1924) 265 U. S. 445, 446:

> "• • • the question whether an improvement requires mere mechanical skill or the exercise of the faculty of invention is one of fact; and, in an action at law for infringement, is to be left to the determination of the jury."

In Tennant v. Peoria & Pekin Union Railway Company, (1944) 321 U. S. 29, the Supreme Court said, page 35:

> "* * * Courts are not free to reweigh the evidence and set aside the jury's verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

And in Lavender v. Kury, (1946) 327 U. S. 645, the Supreme Court stated, page 653:

> "* * * But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

CONCLUSION

For the above reasons, supplemented by those given in appellant's main brief and reply brief, reconsideration of the Opinion of this court is respectfully requested so as to allow the jury's verdict of validity and infringement to stand. And even should the court decide not to grant a petition for rehearing of the issues of validity and infringement, it is respectfully prayed that in view of appellant's financial circumstances and the equities involved herein that the item of "costs" be eliminated from the *Per Curiam* judgment of this court dated December 16, 1953.

Respectfully submitted,

WILLIAM J. RUANO,
Attorney for Plaintiff-Appellant.

I, WILLIAM J. RUANO, attorney for plaintiff-appellant, petitioner herein, do hereby certify that in my judgment the foregoing petition for rehearing is well founded, and that the same is not interposed for delay.

WILLIAM J. RUANO.

Pittsburgh, Pennsylvania,
December 30, 1953.

[fol. 106] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,144

IVAN N. FRAVER, Plaintiff-Appellant

v.

THE STUDEBAKER CORPORATION

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING—January 11, 1954

Present: Kalodner, Staley and Hastie, Circuit Judges

And Now, to wit, this 11th day of January, 1954, it is Ordered that the printed opinion filed herein on December 16, 1953, be and the same hereby is amended as follows:

By adding a final paragraph reading "Each party to bear its own costs."

Further Ordered that the petition for rehearing be and the same hereby is denied.

By the Court, Kalodner, Circuit Judge.

[fol. 107] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,144

IVAN N. FRAVER, Appellant

vs.

THE STUDEBAKER CORPORATION

On Appeal from the United States District Court for the Western District of Pennsylvania

Present: Kalodner, Staley and Hastie, Circuit Judges.

AMENDED JUDGMENT—January 11, 1954

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order and judgment of the said District Court in this case be, and the same is hereby affirmed; each party to bear its own costs.

[File endorsement omitted.]

[fol. 108] Clerk's Certificate to foregoing transcript omitted in printing.